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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re	No.	01-30923 DM
PACIFIC GAS AND ELECTRIC COMPANY,	Chapter	11
Debtor.	Date:	June 27, 2002
	Time:	1:30 p.m.
	Ctrm:	Hon. Dennis Montali 235 Pine Street, 22 nd Floor San Francisco, California

UNITED STATES TRUSTEE'S
OPPOSITION TO DEBTOR'S THIRD MOTION TO EXTEND EXCLUSIVITY

Linda Ekstrom Stanley, United States Trustee, opposes *Pacific Gas and Electric Company's Motion for Order Further Extending Exclusivity Period for Plan of Reorganization* (the "Exclusivity Motion"). In this, its third request to block filing of alternative plans, debtor offers the size and complexity of the case and the existence of competing plans of reorganization as grounds to extend exclusivity. The United States Trustee suggests these factors tilt in favor of terminating exclusivity when the present, extended exclusivity period ends on June 30, 2002. Debtor and PG&E Corporation's plan of reorganization (the "PG&E Plan") present novel issues of preemption and the outcome of their efforts to confirm that plan are uncertain. Equally uncertain is the outcome of the California Public Utilities Commission plan (the "CPUC Plan"), which

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1 faces objections regarding financial feasibility and compliance with the “best interests of
2 creditors” tests, among others.

3 The Bankruptcy Court should refuse to extend exclusivity to December 31, 2002,
4 because the extension will result in unnecessary delay. If neither the PG&E Plan nor
5 the CPUC Plan is confirmed by the Bankruptcy Court, the best course would be to open
6 the resolution of this case to parties who have not yet tried their hands at a plan of
7 reorganization, such as the Official Committee of Unsecured Creditors, or individual
8 creditors.

9 Authorizing the negotiation and submission of alternative plans will be beneficial
10 to the estate and may speed creditor recovery. The only way to ensure parties in
11 interest have the right to full participation in the case if the two alternative plans fail is to
12 give parties the right to file a plan. With the right to file a plan, a party can negotiate for
13 different treatment or file an alternative plan for the consideration of all creditors. If
14 creditors are blocked from filing plans, it is unlikely any plan could be negotiated and
15 filed earlier than April 2003, two years after this solvent bankruptcy case commenced.

16
17 **I. NO CAUSE EXISTS TO EXTEND EXCLUSIVITY BEYOND JUNE 30, 2002**

18 PG&E has not met its burden of proof to show the extension of exclusivity is
19 warranted. The Bankruptcy Court may only extend exclusivity upon a showing of
20 appropriate “cause.” 11 U.S.C. § 1121(d); *In re Texaco*, 79 B.R. 322, 326 (Bankr.
21 S.D.N.Y. 1987). PG&E, as the movant, bears the burden of demonstrating cause exists
22 to extend exclusivity. *Id.* (“The party who seeks the extension . . . has the burden of
23 establishing cause.”); *In re General Bearing Corp.*, 136 B.R. 361, 367 (Bankr. S.D.N.Y.
24 1992).

25 PG&E cites the complexity of the case, the energy marketplace, and the
26 existence of two plans as “cause” to extend exclusivity until December 31, 2002. The
27 United States Trustee does not agree these factors should compel the Court to extend
28 exclusivity. Both debtor and the CPUC steadfastly maintain their opponent’s plans are

1 seriously flawed and cannot be confirmed. For its part, debtor insists the CPUC plan is
2 not feasible and fails to satisfy the best interests of creditors tests. The CPUC, on the
3 other hand, strenuously argues the PG&E Plan represents an unlawful attempt to
4 evade California regulation. Rarely, if ever, have such serious allegations been raised
5 against a chapter 11 plan of reorganization. It is impossible to guess what the outcome
6 of these plans and the objections will be.

7 The obvious solution to the complexity of the case and the existence of two
8 plans with allegedly fatal flaws is to open the case up to the filing of an alternative plan
9 of reorganization. The right to file a different plan would give creditors the weight to
10 negotiate a different resolution than those proposed by the two competing plans. The
11 Bankruptcy Court will enfranchise creditors by giving them a chance to file a plan of
12 reorganization. It makes little sense to grant debtor's motion to extend exclusivity and
13 thereby block creditor access to avenues for rapid payment of claims from this surplus
14 estate.

15 **II. EXTENDING EXCLUSIVITY SHOULD NOT BE AUTHORIZED BECAUSE IT**
16 **CONFLICTS WITH CONGRESS'S INTENT TO ALLOW PARTIES IN**
17 **INTEREST TO PROPOSE PLANS**

18 **A. The Bankruptcy Code Was Not Intended to Restrict Non-Debtors**
19 **From Filing Plans**

20 Congress made a subtle but important change to the practice of proposing plans
21 of reorganization by enacting the current Bankruptcy Code in 1978. Prior to the new
22 statute's enactment, the Bankruptcy Act did not permit non-debtors in chapter XI to file
23 plans of arrangement. Section 1121 of the new Bankruptcy Code completely changed
24 that practice. The statute remedied the perceived weakness of the Act by allowing "any
25 party in interest" to file a plan and disclosure statement under the Code. 11 U.S.C.
26 § 1121(c); *In re Texaco*, 75 B.R. 322, 325 (S.D.N.Y. 1987).

27 The goal reflected in 11 U.S.C. § 1121, in allowing other interested parties
28 to file a plan of reorganization after the expiration of the debtor's
exclusivity period, was predicated on the theory that there should be a
relative balance of negotiating strength between debtors and creditors
during the reorganization process.

1 *Id.*, citing *Teachers Ins. and Ann. Assoc. of Am. v. Lake in the Woods* (*In re Lake in the*
2 *Woods*), 10 B.R. 338, 343 (E.D. Mich. 1981). The Bankruptcy Code was intended to
3 open the plan proposal process to creditors and debtors alike. *Texaco*, 79 B.R. at 325.

4 The Bankruptcy Court should be wary of granting extensions to the extraordinary
5 relief afforded debtors in the grant of exclusivity without clear and compelling
6 justification. Exclusivity should be seen as complementary to the automatic stay. Both
7 are tantamount to an injunction granted without any showing of need by the petitioning
8 debtor. These two pillars of the Bankruptcy Code give meaning and depth to the
9 “breathing spell” afforded chapter 11 debtors. See H.R. Rep. No. 595, 95th Cong., 2d
10 Sess. 174, *reprinted* in App. C COLLIER ON BANKRUPTCY App. Pt. 4(d)(i) at 1281 (15th
11 ed. rev. 2001) (the breathing spell gives businesses time to work constructively with
12 creditors to propose a plan of reorganization). The stay protects a debtor’s property
13 from legal process while the case is pending. Exclusivity allows a debtor the
14 opportunity to organize its affairs, consider its options, negotiate with creditors and
15 propose a plan:

16 Proposed chapter 11 recognizes the need for the debtor to remain in
17 control to some degree, or else debtors will avoid the reorganization
18 provisions in the bill until it would be too late for them to be an effective
19 remedy.

18 H. R. Rep. No. 95-595, 95th Cong., 1st Sess. 231-32, *reprinted in* App. C COLLIER ON
19 BANKRUPTCY App. Pt. 4(d)(i) at 1352 (15th ed. rev. 2001).

20 Congress’s initial grant of relief to debtors in chapter 11 cases was never
21 intended to be absolute, particularly in view of the lack of showing required to obtain the
22 relief. Congress expressed concern for the rights of non-debtors, too:

23 At the same time, the bill recognizes the legitimate interests of creditors,
24 whose money is in the enterprise as much as the debtor’s, to have a say
25 in the future of the company. The bill gives the debtor an exclusive right
26 to propose a plan for 120 days. In most cases, 120 days will give the
debtor adequate time to negotiate a settlement, without unduly delaying
creditors . . .

27 If, on the other hand, a debtor delayed in arriving at an agreement, the
28 court could shorten the period [of exclusivity] and permit creditors to
formulate and propose a reorganization plan

1 *Id.*

2 Congress enacted § 1121 to encourage voluntary reorganization but gave
3 debtors only a limited right to self-determination. Congress's limitation on exclusivity
4 must be seen to proscribe a debtor's exclusive right to file a plan. Congress created a
5 creditor democracy in § 1121 and various other provisions of the Code calling for
6 creditor participation. Motions to extend exclusivity should be seen as treading on this
7 democracy. To give effect to Congress's intention, the Bankruptcy Court should grant
8 motions to extend exclusivity reluctantly.

9 **B. Extensions of Exclusivity Should Not Be Used to Block**
10 **Consideration of Other Plans**

11 PG&E's request to extend exclusivity is intended to prevent parties other than
12 debtor, its parent and the CPUC from proposing their own plans of reorganization.
13 Blocking other plans is not a proper purpose for extending exclusivity. "An extension
14 should not be employed as a tactical device to put pressure on parties in interest to
15 yield to a plan they consider unsatisfactory." S.Rep. No. 95-989 95th Cong. 2d Sess.
16 118 *reprinted in* App. C COLLIER ON BANKRUPTCY App. Pt. 4(e)(i) at 2071 (15th ed. rev.
17 2001); *In re Public Serv. Co. of New Hampshire*, 88 B.R. 521, 537.

18 In *Public Service Co. of New Hampshire*, the court agreed to a first extension of
19 exclusivity for debtor, a request supported by many parties in interest. The *Public*
20 *Service Co. of New Hampshire* court cautioned that a determination whether to extend
21 exclusivity must consider the possibility of an "alternate substantial plan." The court
22 suggested future extensions of exclusivity would be carefully scrutinized to avoid the
23 debtor "hold[ing] the creditors and other parties 'hostage' so [it] can force its view of an
24 appropriate plan upon other parties." *In re Public Service Co. of New Hampshire*, 88
25 B.R. at 537.

26 Extensions of exclusivity should only be granted on compelling showings.
27 According to the Fifth Circuit, the bankruptcy court should carefully weigh requests for
28 extension of exclusivity because it "must avoid reinstituting the imbalance between the

debtor and its creditors that characterized proceedings under the old Chapter XI. Section 1121 was designed, and should be faithfully interpreted, to limit the delay that makes creditors the hostages of Chapter 11 debtors.” *In re Timbers of Inwood Forest Assoc., Ltd.*, 808 F.2d 363, 372 (5th Cir. 1987), *aff’d*, 484 U.S. 365, 108 S.Ct. 626 (1988).

III. NO FURTHER EXTENSIONS OF EXCLUSIVITY SHOULD BE GRANTED BECAUSE OF THE COMPLEXITY AND IMPORTANCE OF PG&E’S BANKRUPTCY CASE

Since the inception of this case, innumerable parties including debtor and the Official Committee of Unsecured Creditors, have repeated a favorite incantation: “this case is different.” Indeed, it is. As the Bankruptcy Court in the *Public Service Co. of New Hampshire* case foreshadowed:

This chapter 11 proceeding is unique in that it involves the reorganization of regulated monopoly utility company by private investors. The case is also unique in the sense that it involves an otherwise financially sound utility company

There in fact have been *no* reorganization cases in the federal courts dealing with privately-owned utility companies since the 1930’s. Moreover, the reorganization cases from that prior period usually involve layers of public utility holding companies with convoluted financial dealings that are in no sense analogous to the present proceeding. In a real sense it may well be said that this case is unprecedented.

In re Public Service Co. of New Hampshire, 88 B.R. 521, 525 (Bankr. D.N.H. 1988).

Debtor argues the size and complexity of this case entitle it to an extension of exclusivity.

In a conventional bankruptcy case these factors standing alone might merit a third extension of exclusivity but they are not persuasive in this setting. Debtor and its parent and the CPUC have already filed plans reorganization and have had substantial opportunity to review and amend their plans. The CPUC and debtor do not need additional time to formulate plans.

In *Public Service Co. of New Hampshire*, perhaps the only analogous bankruptcy case in this context, both the bankruptcy court and commentators credit the court’s

1 eventual refusal to permit extensions of exclusivity with a limitation on professional fees
2 and the eventual success of the case. "From the beginning, the court thought
3 competing reorganization plans could be the most efficient route to pursue. The court
4 never gave much credence to the debtor's complaint that terminating the exclusivity
5 period would lead to a chaotic process which would endanger the chances of a quick
6 recovery." John F. Lomax, *Future Electric Utility Bankruptcies: Are They on the Horizon*
7 *and What Can We Learn from Public Service Co. of New Hampshire's Experience*, 12
8 BANKR. DEVEL. J. 535, 566 (1996); *In re Public Service Co. of New Hampshire*, 88 B.R.
9 at 539 and particularly n. 16.

10 The size and complexity of this case do not call out for less information, for more
11 limited terms of reorganization or for a continued and necessarily circumscribed debate
12 over the terms of the two plans of reorganization. Even without attacking any particular
13 component of the two plans, both PG&E and the CPUC's plans represent their
14 proponent's singular view of the energy world and dysfunction in California's energy
15 market. In a case with the complexity of this one, and in view of the novel plans
16 proposed by the respective proponents, it would be wiser to open the floor to alternative
17 proposals which might enhance or shorten creditor recovery and might find the support
18 of a broader range of constituencies than the proponents have mustered to date.

19 **IV. CONCLUSION**

20 The United States Trustee urges the court deny the request for an extension of
21 exclusivity. The request should not be granted because is not supported by any facts to
22 show it is necessary let alone compulsory, it is inconsistent with the intention of the
23 drafters of § 1121 which permit any party to file a plan, and it is not appropriate given
24 the nature of the issues and importance of the case.

25 Date:

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28 By: _____
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